United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING

74-1162

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P/S

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ARCHIE PELTZMAN,

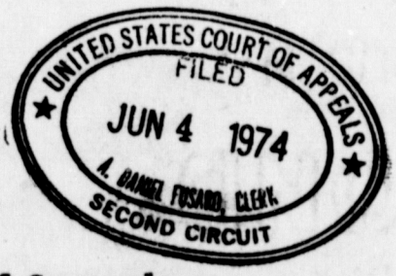
Plaintiff-Appellant,

v.

CENTRAL GULF LINES, INC.,

Defendant-Appellee.

PETITION FOR REHEARING
OF DEFENDANT-APPELLEE
CENTRAL GULF LINES, INC.



LORENZ, FINN, GIARDINO & LAMBOS
Attorneys for Defendant-Appellee,
Central Gulf Lines, Inc.
25 Broadway
New York, New York 10004

(212) 943-2470

Of Counsel:

JAMES A. FLYNN
RICHARD P. LERNER

UNITED STATES COURT OF APPEALS

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Defendant-appellee respectfully requests that the Court reconsider its decision in the above matter.

The Court denied that the dispute was subject to exclusive National Labor Relations Board jurisdiction and remanded the case to the District Court to determine, inter alia, whether defendant-appellee breached the collective bargaining agreement when it terminated plaintiff-appellant pursuant to a valid union security clause in the collective bargaining agreement.[1] It was

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1. Plaintiff-appellant had refused to pay the union's initiation fee which was duly demanded.

this Court's opinion with respect to an alleged breach of the collective bargaining agreement that:

> "It is well settled that contract claims brought under § 301 (a) of the Labor Management Relations Act are not subject to pre-emption by the NLRB, . . ." (Slip Op. 3625)

It is defendant-appellee's position that the decision is inconsistent with the 1971 decision of the U. S. Supreme Court in Motor Coach Employees vs. Lockridge, (403 US 274, 29 L Ed 2d 473, 91 S Ct 1909), in that plaintiff-appellant's termination of employment pursuant to a union security clause is a matter within the exclusive jurisdiction of the NLRB.

Lockridge involved the termination of a union member on the alleged grounds that he had failed to pay his union dues within the requisite period. Termination was pursuant to a union security clause in the applicable collective bargaining agreement. Lockridge claimed that he was not in arrears and sued for reinstatement and damages in the State court and recovered damages on the grounds that he was not in arrears and therefore was not subject to discharge.

The Supreme Court reversed and held that because the discharge was pursuant to a union security clause both federal and state court jurisdiction of the claim was pre-empted by the NLRB

because the union's conduct was either protected or prohibited by the National Labor Relations Act (29 USC 141 et. seq.).

With respect to the argument that Lockridge's complaint was not subject to the exclusive NLRB jurisdiction because it charged a breach of contract rather than an unfair labor practice, the Supreme Court stated:

> "Assuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable. Pre-emption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern. Indeed, the notion that a relevant distinction exists for such purposes between particularized and generalized labor law was explicitly rejected in Garmon itself. 359 US, at 244, 3 L Ed 2d at 782." (403 US at 292)

The Supreme Court noted that the NLRA prohibits a union from causing or attempting to cause an employer to discriminate

against an employee because union membership has been prohibited "on grounds other than" failure to pay his membership dues.[2] In this regard the Court observed that:

> ". . . this has led the Board routinely and frequently to inquire into the proper construction of union regulations in order to ascertain whether the union properly found an employee to have been derelict in his dues-paying responsibilities, where his discharge was procured on the asserted grounds of nonmembership in the union. See, e. g. NLRB v Allied Independent Union, 238 F2d 120 (CA7 1956); NLRB v Leece-Neville Co., 330 F2d 242 (CA6 1964); Communications Workers v NLRB, 215 F2d 835 (CA2 1954); NLRB v Spector Freight System, Inc., 273 F2d 272 (CA8 1960). See generally 3 CCH Lab L Rep ¶ 4525 (Labor Relations). That a union may in good faith have misconstrued its own rules has not been treated by the Board as a defense to a claimed

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2. Or ". . . failure of the employee to tender . . . the initiation fees uniformly required as a condition of acquiring . . . membership . . ." (29 USC 158 (a) (3).

violation of § 8 (b) (2). In the Board's view, it is the fact of misapplication by a union of its rules, not the motivation for that discrimination, that constitutes an unfair labor practice. [Citations omitted.]

"From the foregoing, then, it would seem that this case indeed represents one of the clearest instances where the Garmon principle, properly understood, should operate to oust state court jurisdiction. There being no doubt that the conduct here involved was arguable protected by § 7 or prohibited by § 8 of the Act, the full range of very substantial interests the pre-emption doctrine seeks to protect is directly implicated here." (403 US at 293)

In addressing itself further to this point the Supreme Court noted that Lockridge's

> ". . . entire case turned upon the construction of the applicable union security clause, a matter as to which, as shown above, federal concern is pervasive and its regulation complex." (403 US at 296) [Emphasis added.]

The above excerpts from the Court's decision squarly cover the present case since it is plaintiff-appellant's claim that he was treated differently from others in the same position with respect to the union's determination that he must pay an initiation fee. In other words, the issue here is whether or not plaintiff-appellant's membership in the union was terminated "on some grounds other than" his failure to pay the standard dues and initiation fees required of all members. As the court noted this issue, unlike possibly other contract disputes, is one that the NLRB "routinely and frequently" considers and federal concern is "pervasive and its regulation complex."

We respectfully submit that Lockridge requires a finding here of NLRB pre-emption since plaintiff-appellant's termination was based on the provisions of the applicable union security clause.

We respectfully request that this Court reverse its prior determination and affirm the District Court's grant of summary judgment dismissing the complaint on the ground that the

claim was a matter over which the National Labor Relations Board has exclusive jurisdiction.

Dated: New York, New York
June 4, 1974

LORENZ, FINN, GIARDINO & LAMBOS
25 Broadway
New York, New York 10004
(212) 943-2470

Of Counsel

James A. Flynn
Richard P. Lerner

UNITED STATES COURT OF APPEALS
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v.

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Defendant-Appellee.

AFFIDAVIT OF SERVICE

No. 942 - September Term 1973

Docket No. 74-1162

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LUCIANA D'ORAZIO, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 2018 52nd Street, Brooklyn, New York 11204. That on the 4th day of June, 1974, deponent served the Petition For Rehearing of Defendant-Appellee Central Gulf Lines, Inc. upon Archie Peltzman, Plaintiff-Appellant in this action, at 8725 16th Avenue, Brooklyn, N.Y. 11224, the address designated by said Plaintiff-Appellant for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Luciana D'Orazio
LUCIANA D'ORAZIO

Sworn to before me this
4th day of June, 1974.

Notary Public

Notary Public, State of New York
No. 31-0300511
Qualified in New York County
Commission Expires March 30, 1976

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is the attorney(s) of record for in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF SERVICE BY MAIL**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.: **AFFIDAVIT OF PERSONAL SERVICE**

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19 .....

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

LORENZ, FINN, GIARDINO & LAMBOS

Attorneys for

Office and Post Office Address

21 West Street

Borough of Manhattan **New York, N. Y. 10006**

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

LORENZ, FINN, GIARDINO & LAMBOS

Attorneys for

Office and Post Office Address

21 West Street

Borough of Manhattan **New York, N. Y. 10006**

To

Attorney(s) for

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AFFIDAVIT OF SERVICE

LORENZ, FINN, GIARDINO & LAMBOS

Attorneys for Defendant-Appellee

Office and Post Office Address, Telephone

~~21 West Street~~ 25 Broadway

Borough of Manhattan **New York, N. Y. ~~10006~~ 10004**

943-2470

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for